Advisory Opinion 12-006

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2011). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On February 24, 2012, the Information Policy Analysis Division (IPAD) received a letter dated February 21, 2012, from Maggie Wallner, attorney for Independent School District 191, Burnsville-Eagan-Savage. In her letter, Ms. Wallner asked the Commissioner to issue an advisory opinion regarding the classification of certain data the District maintains. IPAD asked for additional information/clarification, which Ms. Wallner provided on March 2, 2012.

In letters dated, March 5, 2012, the Commissioner invited Leita Walker, attorney for the *Star Tribune* and Christopher Magan, reporter for the *Pioneer Press*, as well as Tania Chance and "X" (a pseudonym), data subjects whose rights may be affected by this opinion, an opportunity to comment. IPAD received Ms. Walker's comments on March 13, 2012, and Mr. Magan's on March 16, 2012. The data subjects did not submit comments.

A summary of the facts follows. Ms. Wallner wrote in her opinion request:

> The School District has received data requests from the media, including the St. Paul Pioneer Press and the Minneapolis Star Tribune, regarding a Separation Agreement entered into between the School District and the School District's former Executive Director of Organizational Development, Tania Z. Chance.
> ….
> Pioneer press reporter, Christopher Magan, has requested reasons for the Separation Agreement beyond the reasons set forth in the written Agreement….
>
> Likewise, Leita Walker, legal counsel for the Star Tribune contends that the Separation Agreement does not contain specific reasons for the Agreement and requests that the District "separately provide a list of such reasons."

In response to the initial data requests by Mr. Magan and Ms. Walker, the District released a redacted copy of the separation agreement; they then requested unredacted copies of the agreement.

Ms. Wallner further wrote:

> [I]t is the School District's position that it has provided the requestors the reasons for the Separation Agreement… It is the School District's position that the entire Separation Agreement is not classified as public data; rather, public data is limited to the language in the Agreement that constitutes "terms."

The District provided the Commissioner with an unredacted copy of the separation agreement to review, per Minnesota Statutes, section 13.072, subdivision 4.

Issues:

Based on Ms. Wallner's opinion request, the Commissioner agreed to address the following issues:

1. Pursuant to Minnesota Statutes, Chapter 13, what is the classification of data Independent School District 191, Burnsville-Eagan-Savage, redacted under Minnesota Statutes, section 13.43, subdivisions 1 and 4, in response to a request for "terms" of and "specific reasons" for a separation agreement between the District and an employee?

2. To the extent that the redacted separation agreement does not contain "specific reasons" for the agreement as required by Minnesota Statutes, section 13.43, subdivision 2(a)(6), must the district provide that data to the public?

Discussion:

Pursuant to Minnesota Statutes, section 13.03, subdivision 1, government data are public unless otherwise classified. Minnesota Statutes, section 13.43, classifies data on individuals who are current or former employees of a government entity. Subdivision 2 lists the types of personnel data that are public and subdivision 4 classifies most other types of personnel data as private.

Issue 1. *Pursuant to Minnesota Statutes, Chapter 13, what is the classification of data Independent School District 191, Burnsville-Eagan-Savage, redacted under Minnesota Statutes, section 13.43, subdivisions 1 and 4, in response to a request for "terms" of and "specific reasons" for a separation agreement between the District and an employee?*

Minnesota Statutes, section 13.43, subdivision 2(a)(6) states that the following data are public:

> the terms of any agreement settling any dispute arising out of an employment relationship, including a buyout agreement as defined in section 123B.143, subdivision 2, paragraph (a); except that the agreement must include specific reasons for the agreement if it involves the payment of more than $10,000 of public money;

On behalf of the District, Ms. Wallner has argued that certain data within the agreement should be classified as private, despite the language in section 13.43, subdivision 2(a)(6), because the data relate to conditions rather than terms. In her supplemental material, she states that the classification of the data at issue hinged on the difference between a "term" and a "condition," using definitions from Black's Law Dictionary.

However, under Minnesota Statutes, section 645.08, "words and phrases are construed according to rules of grammar and according to their common and approved usage." While the distinction between a "term" and a "condition" might be pertinent in resolving an issue related to the actual performance of duties under the agreement at issue, in interpreting the provisions of Chapter 13, the Commissioner looks to the plain language of the law and its common and approved usage. *Merriam Webster's Collegiate Dictionary, Tenth Edition*, Merriam-Webster, Incorporated, 1996, defines "terms" as, "provisions that determine the nature and scope of an agreement."

Ms. Wallner further argued:

> The classification of the redacted language in Section II(c)(d) of the Separation Agreement is classified as private data in the possession of another government entity. Absent a *specific* statute changing the classification of the data to public data, it retains its private classification in the possession of the School District. [Emphasis provided.]

However, in this case, there is a specific statute that alters the classification of otherwise not public data: section 13.43, subdivision 2(a)(6). The Commissioner has previously opined that not public data could be included in the terms of a settlement agreement and that the operation of section 13.43, subdivision 2(a)(6), is such that those data elements would become public. In Advisory Opinion 97-017, the Commissioner wrote:

> [I]t seems reasonable to assume that if the Legislature intended for medical data, which are part of a settlement agreement, to remain private, it (the Legislature) would have enacted the appropriate language."

Advisory Opinion 09-024 further refined that argument:

> The Commissioner notes that the [parties] could have agreed to include in the settlement agreement additional information related to the dispute that otherwise are not public. As terms of the agreement, those data would then be public.

Therefore, all terms of an agreement, in their entirety, regardless of the classification elsewhere, are public under section 13.43, subdivision 2(a)(6).

It does not follow that every data element within the four corners of a separation agreement is public data, however. Ms. Walker, from the *Star Tribune*, quotes language in Advisory Opinion 94-051 to support her argument that *all* data within a separation agreement are public:

> The terms of settlement agreements resolving disputes arising out of the employment relationship are always public data for purposes of Chapter 13…. Wherever a settlement agreement appears in these exhibits, *the complete contents of that agreement are public data.* (Emphasis provided.)

While Ms. Walker emphasized certain language, the operative language in that sentence is, "*in these exhibits*," which pointedly refers to the specific exhibits at issue in that Opinion, rather than settlement agreements generally. More important is the first quoted section, which is consistent with the interpretation in Advisory Opinions 97-017 and 09-024, that the entire agreement is not necessarily public, but the *terms* of these types of agreements are always public.

Because terms are always public data, it follows then, that in order for data to be classifiable as not public, the data cannot be terms of the agreement. Indeed, Chapter 13 contemplates this possibility in Minnesota Statutes, section 13.08, subdivision 6, which provides immunity for the release of not public data in a settlement agreement that may become public by operation of a later-enacted statute. As Ms. Wallner argues, "[t]he immunity provided in the statute would not be necessary if all data contained in a settlement agreement is classified as public upon execution."

It is the opinion of the Commissioner that the redacted portions of Section II of the separation agreement describe actions to be taken in order for the parties to fulfill their obligations to one another, thus defining the nature and scope of the agreement. Therefore, the redacted portions constitute "terms" within the meaning of section 13.43, subdivision 2(a)(6) and are public.

The Commissioner further opines that the reference letters marked Attachment 1 and 2 of the separation agreement, which the District wholly redacted, are not terms of the agreement. Section VI of the separation agreement states that the District will provide Ms. Chance with two letters of recommendation upon the satisfaction of other conditions within the agreement. That is a "term" of the agreement, setting forth the conditions upon which the letters will be signed and distributed. The letters themselves, however, are non-term data about Ms. Chance as a former employee of the District and possibly about other individuals associated with the District. Therefore, the data in the letters are not made public as terms and are classified according to other provisions in section 13.43.

However, Chapter 13 classifies data elements, not entire documents. After reviewing the contents of the letters, it is the Commissioner's opinion that portions of the letters contain data made public by other provisions of section 13.43, subdivision 2, and should not have been redacted. For example, employee names, terms and conditions of employment, job title, job description, and date of first and last employment are public data. Other data in the letters of recommendation were properly redacted as data in the nature of a performance evaluation, which are private under subdivision 4.

As to whether any of the data the District redacted constitute "specific reasons" for the agreement, the Commissioner addressed that issue in Advisory Opinion 09-024. In that Opinion, the Commissioner also looked to the common and approved usage of the statutory language and concluded that the agreement at issue there contained the specific reasons for the agreement:

> Section 13.43 does not define "specific reason." *Merriam Webster's Collegiate Dictionary, Tenth Edition*, Merriam-Webster, Incorporated, 1996, defines "specific" as "free from ambiguity: accurate" and defines "reason" as "a statement offered in explanation or justification."

In that Opinion, the District argued, and the Commissioner agreed, that the specific reasons for the agreement were provided throughout the 17- page agreement and that the phrase "specific reasons" meant, "explanation sufficient to show that the payment was not a gift under guise of a compromise."

In applying those arguments to Ms. Chance's agreement, the Commissioner opines that to the extent that the redacted terms in Section II also provide justification or explanation for the agreement, they constitute "specific reasons for the agreement," and as such, they are public data.

The data in the letters, however, do not provide specific explanation or justification for the agreement, and therefore, because they do not constitute specific reasons, the data may not be classified as public under section 13.43, subdivision 2(a)(6) (though some of the data may be classified as public pursuant to another provision of section 13.43, as discussed above).

Issue 2. *To the extent that the redacted separation agreement does not contain "specific reasons" for the agreement as required by Minnesota Statutes, section 13.43, subdivision 2(a)(6), must the district provide that data to the public?*

Chapter 13 contains few provisions requiring the creation of data. Section 13.43, subdivision 2(a)(6), is one such provision; entities must include the specific reasons for the agreement in any settlement agreement that involves a payment of $10,000 or more. However, government entities are not required to create data to respond to data requests. (See Advisory Opinions 00-048, 01-011, and 01-012.)

When drafting these agreements, the District must also be mindful of its responsibilities under the Official Records Act, Minnesota Statutes, section 15.17, which requires government entities to create and maintain records sufficient to document their official activities. (See Advisory Opinions 99-005, 08-026, and 10-017.) The Commissioner understands that government entities must balance a variety of interests when negotiating and drafting settlement agreements. He encourages them to find ways to achieve that balance while meeting their obligations both to the public and to data subjects.

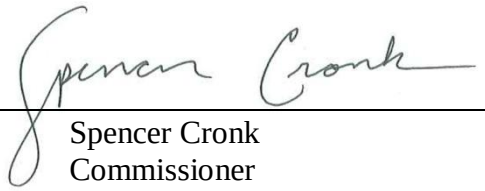
Finally, the Commissioner is aware that the current Legislature is working to provide clarity to section 13.43, subdivision 2(a)(6).

Opinion:

Based on the facts and information provided, the Commissioner's opinion on the issues Ms. Wallner raised is as follows:

1. Pursuant to Minnesota Statutes, Chapter 13, data redacted in Section II of the separation agreement between Independent School District 191, Burnsville-Eagan-Savage and Tania Chance are terms and/or data documenting the specific reasons for the agreement, and are therefore public. Data redacted from the letters of recommendation are neither terms nor data that document the specific reasons for the agreement; they are therefore classified as public or private, pursuant to Minnesota Statutes, section 13.43, subdivisions 2 and 4. It is also possible that some of the data in the letters are not personnel data, or even data on individuals, and are therefore presumptively public.

2. Pursuant to Chapter 13, the District does not need to create data to respond to a data request. When drafting these types of agreements, the District must be mindful of its responsibilities under the Official Records Act, Minnesota Statutes, section 15.17.

Signed: 

Spencer Cronk
Commissioner

Dated: 4/20/2012